
U.S. Department of Labor
Office of Administrative Law Judges
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CASE No. 86-ERA-23

In the Matter of

JOSEPH J. MACKTAL, JR.,
Complainant

v.

BROWN & ROOT, INC.,
Respondent

INITIAL DECISION AND ORDER GRANTING ATTORNEY'S FEES

This proceeding arises under the Energy Reorganization Act of 1974(hereinafter "ERA"), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24 which are employee protective provisions of the ERA or of the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2011, et seq. On January 6, 1998, the Administrative Review Board (hereinafter "ARB") issued a Final Decision and Order which upheld the Recommended Order of Dismissal of the undersigned which found that Complainant had not shown that before he was discharged that he had engaged in activity protected under the ERA as interpreted by the Fifth Circuit. Nevertheless, the ARB indicated that earlier in the stage of litigation, Complainant had entered into a settlement agreement in which he accepted $35,000 which included $15,000 to him and $20,000 to his attorneys from Respondent. After receiving the settlement, Complainant argued that certain terms of the settlement agreement were illegal. The Secretary agreed with

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Complainant and issued an Order Disapproving Settlement. The ARB found that Complainant would be entitled to attorney's fees and costs limited to the attorney time reasonably spent only on litigation of the legality of the restrictive settlement terms. See, eg., Hensley v. Eckerhart, 461 U.S. 424 (1983); Gaballa v. The Atlantic Group, 94-ERA-9 (Sec'y. Dec. 7, 1995). Therefore, this matter is now before this Court for a consideration of the attorney's fees and costs.

On February 2, 1998, Complainant filed an Application for Attorney Fees and Costs. Complainant is requesting attorney fees and costs for three attorneys. The fees for Stephen M. Kohn represent 204.96 hours at an hourly rate of $300 totaling $61,488. The fees for Michael Kohn represent 64.16 hours at an hourly rate of $300 totaling $19,248. The fees for David Colapinto represent 42.80 hours at an hourly rate of $250 totaling $10,700. On March 13, 1998, Respondent filed a Response in Opposition to Complainant's Application for Attorney's Fees and Costs.

Respondent initially argues that Complainant is not entitled to an award of attorney's fee in this case. Respondent notes that the statutory authority of the Secretary to award attorney's fees is limited to situations in which all of the following conditions are met: 1) a complaint has been filed under 42 U.S.C. § 5851(b)(1); 2) the Secretary determines that a violation of 42 U.S.C. § 5851(a) has occurred; and 3) the Secretary issues and order to take affirmative action to abate the violation and reinstate the complainant to his former position.[1] Respondent additionally argues that even if an award was appropriate, Complainant has failed to submit a written fee agreement or otherwise demonstrate that he is financially responsible for the fees or costs sought. Finally, Respondent argues that even if fees were awarded, the amounts sought by Complainant are unreasonable in regard to the hourly rates and hours expended.

On the other hand, Complainant argues that he has fully satisfied the legal standard for entitlement to an award of attorney's fees and costs under 29 C.F.R. § 24.6(b)(3). Furthermore, Complainant points to the January 6, 1998 order of the ARB. In addition, Complainant argues that the fees and costs are reasonable.

Findings of Fact and Conclusions of Law

Section 5851(b)(2)(B) of the ERA provides for attorney's fees and costs "reasonably incurred" in the bringing of a complaint. 42 U.S.C. §5851(b)(2)(B)(1988). In calculating attorney fees under the statute, this Court will employ the lodestar method which requires multiplying the number of hour reasonably expended in pursuing the litigation by a reasonable hourly rate. Hensley, 461 U.S. 424. A fee request should not result in a second major litigation. Daly v. Hill, 790 F.2d 1071, 1079 (4th Cir. 1986); Hensley, 461 U.S. 424. Furthermore, it is not necessary that a fee award achieve technical perfection in order for the results to fall within the area of discretion assigned to the trier of the facts, Daly, supra, 790 F.2d at 1082, which is to say that the trier of fact need not get enmeshed in a meticulous analysis of every detailed fact. Copeland v. Marshall, 641 F.2d 880, 903 (D.C. 1980); Lindy Brothers Builders, Inc. v. American Radiator, Etc., 540 F.2d 102, 116 (3rd Cir. 1976).

Respondent initially argues that based on precedent from the Board and the Fifth Circuit a complainant may recover no more in attorney's fees and costs than he is obligated to pay his attorneys. McCafferty v. Centerior Energy, 96-ERA-6 (ARB Sep. 24, 1997); Marre v. U.S., 38 F.3d 823 (5th Cir. 1994). Even if Complainant did agree to be responsible for fees and costs, Respondent argues that it is entitled to know what that agreement was and to see it in writing. Respondent notes that Complainant did not attach any written contingent fee agreement to his application for attorney's fees. Respondent further indicates that if Complainant never had a written contingent fee agreement that would be a violation of Ethical Rule 1.5(c). See In Re Lawrence E. Williams, Jr., 693 A.2d 327, 329 (D.C. Ct. App. 1997).

This Court must reject Respondent's first argument based on the fact that case law has held that a fee arrangement between a complainant and his or her counsel is not controlling. See Delcore v. W.J. Barney Corp., 89-ERA-38 (Sec'y June 9, 1995); Tinsley v. 179 South Street Venture, 89CAA-3 (Sec'y Aug. 3, 1989)(order of remand). It has been held that a complainant has the burden to establish the reasonableness of the fee by submitting a fee petition detailing the work performed, the time spent on such work, and the hourly rate of those performing the work. Tinsley, 89-CAA-3. Therefore, this Court finds that any fee arrangement in this case is not controlling.

In the alternative, Respondent argues that the fees sought in the application are unreasonable. In regard to the hourly rate, Respondent argues that Complainant's counsel have failed to produce evidence justifying the rates sought in their application. Respondent notes that in the affidavits in support of the fee application attorneys Stephen Kohn and Michael Kohn indicate that Complainant agreed that Kohn, Kohn & Colapinto would be paid their fees and costs "at their market rate." Respondent argues that the affidavit of Joseph Kaplan does not constitute competent evidence supporting an award of fees. Even if using the Laffey Matrix to determine the hourly rates, Respondent argues that the rates sought by counsel are excessive. Furthermore, Respondent argues that Complainant's counsel are not entitled to an upward adjustment of the market value of their services. Respondent finally argues that the hourly rates are excessive based on the fact that many of the services for which compensation are sought should have been performed by individuals with lower hourly rates. See, e.g., Missouri v. Jenkins, 491 U.S. 274, 288 n.10 (1989).

A reasonable attorney's fee is based on rates prevailing in the community for similar services. Blum v. Stenson, 465 U.S. 886, 869, n.11 (1984). This Court notes that the hourly rate should reflect rates in effect at the time the fee is established, rather than those in effect at the time the services were performed. Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983). Furthermore, this Court has also taken into account the delay in the receipt of payment. See Missouri v. Jenkins, 491 U.S. 274, 282-284 (1989). Upon consideration of the qualifications of counsel in support of their fee application and the Laffey Matrix, this Court finds that a reasonable hourly rate for Stephen and Michael

Kohn is $285 while for David Colapinto a reasonable hourly fee is $235 an hour for all of the work performed.

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In regard to the hours for which an award is sought, Respondent notes that Complainant's counsel contend that they are entitled to 75% of the fees they logged during the period from August 1988 through November 1989 and 50% of the fees logged during the period December 1989 through May 199 1. Respondent argues that these percentages should be substantially lower. In regard to the period of August 1988 through November 1989, Respondent notes that it seems likely that a substantial part of the services during this period would have involved familiarizing themselves with the facts of the case and the procedural history since counsel had just started to represent Complainant. For example, Respondent points to the three days of meetings totaling 56 hours on August 29, 30 and 31, 1988 which seems excessive for the investigation of factual issues relative to the execution of a settlement agreement. Respondent also argues that time spent by Stephen Kohn researching and reviewing OAA files would likely be related to a general review of the file for the purpose of becoming more familiar with the proceedings. Thus, Respondent argues that the fees should not exceed one third of the time logged for this period.

In regard to the affidavits of Stephen M. Kohn and Michael D. Kohn, this Court initially notes that in regard to the period of time from August 1988 to November 1989 Complainant has requested 75% of the total fees. This Court has extensively reviewed the procedural history of this case and notes that the percentage of time allegedly expended for the legality of the restrictive settlement agreement is excessive. Furthermore, this Court notes that some of the descriptions of the activity during this time lacked specificity in order for this Court to determine whether the time expended was related to the settlement agreement. Therefore, this Court will award both attorneys 50% of the time expended during the period from August 1988 to November 1989. This Court will also award David K. Colapinta 50% of the time expended from August 1988 to November 1989.

In addition, Respondent argues that Complainant's overstate their claim for fees incurred in the appellate proceedings since most of the issues raised on appeal were unsuccessful. Macktal v. Secretary of Labor, 923 F.2d 1150 (5th Cir. 1991). This Court agrees with awarding Complainant's counsel 50% of the time expended for the appeal since the Fifth Circuit did agree with Complainant on a major issue. In regard to the remaining time periods, this Court has reviewed the time expended and finds the time reasonable. In addition, this Court has reviewed the $3,830.07 in costs and finds the costs reasonable.

Respondent finally argues that if Complainant is awarded any attorney's fees there should be a setoff for the $35,000 including interest for the amount received in the 1987 settlement agreement. See Oubre v. Entergy Operations, Inc., 118 S.Ct. 838 (1998).

Respondent indicates that the application of equitable principles in making awards of attorney's fees pursuant to statutory fee provisions is well established. See, e.g., Wolf v. Frank, 477 F.2d 467, 480 (5th Cir. 1973). This Court finds that Respondent should receive a credit for the amount of money paid in attorney's fees in the 1987 settlement. The ARB noted that Respondent received $20,000. Thus, this Court finds that Respondent will receive a credit for the $20,000 received in 1987. However, this Court finds that there is no authority to also award interest.

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Complainant finally argues that interest should be awarded on the attorney's fees and costs. See, e.g., Fleming v. County of Kane, 898 F.2d 553, 564 (5th Cir. 1990). This Court finds that interest should not be awarded in this case as Complainant's counsel have already received a benefit for the delay in payment when considering the hourly rates allowed for each of the attorneys. Therefore, this Court will not award interest based on a delay in payment because to do so would create a double windfall for Complainant's counsel.

INITIAL ORDER

It is hereby RECOMMENDED that Brown & Root pay to Complainant's counsel costs in the amount of $3,830.07 and the following amounts for attorney's fees:

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1. Stephen M. Kohn  169.225 hrs x $285/hr.      = $48,229.13
2. Michael D. Kohn  52.395 hrs x $285/hr.       = $14,932.58
3. David K. Colapinto    33.75   hrs x $235/hr. = $ 7,931.25

                          Total Hours Awarded = $ 71,092.96[2]
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SO **ORDERED** this, 30th day of March, 1998, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/lp

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 202 1 0. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1]Although this Court finds that Respondent's initial argument does have merit, this Court is bound to follow the mandate of the ARB who found that Complainant would be entitled to attorney's fees and costs limited to the reasonable amount of time spent on the litigation of the legality of the restrictive settlement terms. This Court has reviewed the two cases the ARB mentioned in the final decision and order. In Hensley v. Eckerhart, the Supreme Court defined the conditions under which a person who is partially successful on some of his claims may recover attorney's fees under the Civil Rights Attorneys Fees Award Act. 461 U.S. 424. The Court noted that the degree of success attained is the most crucial factor to consider and that if a plaintiff achieves only partial or limited success, the product of hours reasonably expended on litigation as a whole times a reasonable hourly rate may result in an excessive amount. 461 U.S. at 436, 440. The Hensley court established a two part test. First, did the claimant's unsuccessful claims relate to the claims on which he was successful? 461 U.S. at 434. Second, did the claimant succeed at a level that makes the hours reasonably expended a satisfactory basis for a fee award? Id. This Court questions whether the factors above are even applicable to the facts of this case. Furthermore, the ARB mentioned the Gaballa case which was brought under the provisions of the ERA. 94-ERA-9. However, the Gaballa case is distinguishable from this case in that in the Gaballa case discrimination was found whereas in this case no discrimination was found to have occurred.

Therefore, this Court will not address Respondent's arguments which are based on the argument that there must be discrimination first in order to award attorney's fees. Respondent additionally argued that the ERA does not authorize the Secretary to award attorney's fees for proceedings before the Court of Appeals. This Court notes that in cases arising in the Sixth Circuit, the Secretary and the Board are not authorized to award attorney's fees for appellate work before the court of appeals. DeFord v. Tennessee Valley Authority, 715 F.2d 231, 232-33 (6th Cir. 1983). In Fourth Circuit cases, the Secretary and Board are permitted to order the respondent to pay attorney fees for appellate work in the court of appeals. Blackburn v. Reich, 79 F.3d 1375 (4th Cir. 1996). The ARB has also adopted the Blackburn decision in cases outside the Sixth Circuit. Pillow v. Bechtel Construction, Inc., 87-ERA-35 (ARB Sept. 11, 1997). Thus, here, in the Fifth Circuit, this Court will follow the predicate of the ARB and allow attorney's fees for appellate work.

[2]Respondent shall receive a credit of $20,000 for the previous 1987 settlement.